Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 197__

78-1910

NO. _____

COTTON E. DAVIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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IN THE

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PETITION FOR A WRIT OF CERTIORARI
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Cotton E. Davis, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this case on May 24, 1979.

OPINION BELOW

The opinion of the Court of Appeals below (Appendix A, *infra*, A. 1), is an unpublished decision. The opinion of the District Court was not reported. Pertinent excerpts from the instruction of the Court to the jury, taken from the trial transcript, are set forth in Appendix B, *infra*, A. 4.

JURISDICTION

The judgment of the Court below (Appendix A, *infra*, A. 1) was entered on May 24, 1979. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED TO THE JURY

Whether the trial court's instructions to the jury in a criminal case, wherein the Government's case was based entirely on circumstantial evidence, that "[c]ircumstantial evidence is sufficient to support a verdict of guilty, however, even though it does not exclude every reasonable hypothesis consistent with innocence," and the decision of the United States Court of Appeals for the Fourth Circuit, in sustaining the conviction and the instructions involved, were in conflict with applicable decisions of this Court, and in conflict with the decision of another court of appeals on the same matter?

CONSITUTIONAL PROVISIONS INVOLVED

The instruction involved concerns the application of the Due Process Clause of the Fifth Amendment, United States Constitution.

STATEMENT

The facts necessary to place in their setting the question now raised can be briefly stated as follows:

The Petitioner was convicted of importing approximately 945 pounds of hashish, 21 pounds of hashish oil, and four pounds of marijuana seeds into the United States. The drugs were discovered by Customs' agents in two secret compartments, welded into the bottom of the Petitioner's automotive van, when the Petitioner returned to the United States from Iran. The Petitioner denied knowledge of the presence of the drugs on his van. Although the Petitioner declared himself to be unemployed when initially questioned by Customs' agents, he stated his extensive European and far-East travels were financed by profits he earned as a part-time car salesman in Europe and from income he earned as a musician and as an Oriental rug merchant. Petitioner maintained he had no idea how the drugs were placed on his van, and he denied that he knew anything about the two relatively large secret containers which were discovered on the body of his van, or how the drugs were placed therein. He testified that prior to leaving Iran he had left his vehicle unattended for some 21 days in a hotel parking lot, while he visited another city.

The prosecution's case against the Petitioner was based upon the fact that the Petitioner had expended relatively large sums of money for the purchase of the van and for his extended world travels, plus the factors that the hidden compartments were not on the van when it was purchased, the Petitioner had no visible source of income, and the Petitioner, of course, had attempted to clear the van through U.S. Customs without declaring the presence of the prohibited drugs.

That portion of the trial court's instructions to the jury to which the trial defense counsel objected is set forth below:

> The jury is instructed that if it believes that there are two alternative inferences that can be drawn equally as well as from all the facts in the case, then it is your duty to adopt the inference most favorable to the defendant since you cannot find the defendant guilty unless you believe that each essential element in the crime charged has been proven beyond a reasonable doubt.
>
> Circumstantial evidence is sufficient to support a verdict of guilty, however, even though it does not exclude every reasonable hypothesis consistent with innocence.

REASON FOR GRANTING THE WRIT

A.

THE COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE CASE LAW OF THIS COURT.

The Court of Appeals, reading the instruction as a whole, appraised "the error, if any, as harmless." The Court based its holding in this regard on this Court's decision in *Holland v. United States*, 348 U.S. 121, 140 (1954), holding herein that the instruction given was "fair and reasonable," and sufficiently placed the burden of proof upon the Government. The Court of Appeals, however, added that courts in the future should, nonetheless, "refrain from instructing juries that the prosecution's evidence need not exclude every reasonable hypothesis consistent with innocence. This language is more likely to confuse than to instruct a jury."

In *Holland, supra*, the Supreme Court was faced with a situation where the trial court had *refused* to give a defense requested instruction "that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt." The Court held that in the particular facts involved in *Holland*, where the jury is properly instructed on the standard of reasonable doubt, such an "additional instruction on circumstantial evidence is confusing and incorrect." 348 U.S., 139-140. The Court stated there was "some support," however, for this type of instruction.

This, of course, is a far cry from endorsing an instruction on circumstantial evidence that directly *contradicts* the requested instruction in *Holland*, as was done by the trial court and the Court of Appeals in the present case.

In *Holland*, which was an income tax evasion case, wherein the Government rested its case "solely on the approximations and circumstantial inferences of a net worth computation," the Court held that the "cogency" of the Government's proof "depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt." 348 U.S., 135. The Government did in fact negative explanations suggested by the defendant as to his source of non-taxable income over the years. However, "it did not negative all the *possible* non-taxable sources of the alleged net worth increases – gifts, loans, inheritances, etc." 348 U.S., 137. The Court pointed out that in situations of this sort, the jury could accept proof that the income sprang from a "likely source," as sufficient (such as the taxpayer's business), but added that the Government may not "disregard explanations of the defendant *reasonably susceptible of being checked*." 348 U.S., 138. It was in this setting that this Court in *Holland* held that the refusal of the trial court to instruct for the defendant that "where the

Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt."

It is thus submitted that the trial court's instruction in the present case, wherein it instructed the jury, over the objection of defendant's counsel, that the defendant could be convicted upon circumstantial evidence, "even though it does not exclude every reasonable hypothesis consistent with innocence," is inconsistent and contrary to the holding of *Holland*. In the present case, the jury could have accepted the view that the Petitioner did in fact know where the drugs came from, and how they were put on his truck. In the language of *Holland*, this indeed might be a most "likely" view of the evidence. But, to continue the *Holland* admonition, and applying it to the present case, even where the jury may accept the most "likely" view of evidence, it may still not disregard an explanation of a defendant "reasonably susceptible" of being true. Hence, the trial court's instruction in this case, informing the jury that circumstantial evidence was sufficient to convict even though it did not "exclude every reasonable hypothesis consistent with innocence," was to invite the jury to convict the Petitioner however *reasonable* the jury might have found his explanation to be. This is in contradiction to the *Holland* standard.

B.

THE COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT WHICH SHOULD BE, SETTLED BY THIS COURT.

The Court of Appeals affirmatively sustained an instruction informing a jury in effect, that a criminal defendant in a purely circumstantial case, could be convicted even though the

jury was satisfied that an explanation offered by the defendant was perfectly reasonable and thoroughly consistent with innocence. This instruction was *not* sanctioned in *Holland, supra*, nor has it ever been approved by this Court. It is an instruction that seriouslylessens the burden that the Government must shoulder in a criminal case, and accordingly, is a subject which this Court should review.

C.

THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT CONFLICTS WITH THE DECISIONS OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ON THE SUBJECT INVOLVED.

The Fifth Circuit has consistently held that *Holland* simply means that in order to sustain convictions in cases "based on circumstantial evidence the evidence must be such that a *jury* could conclude that it is inconsistent with every reasonable hypothesis of innocence." *United States v. Brown*, 547 F.2d 1264, 1266 (5th Cir. 1977). Thus the Fifth Circuit (unlike the Fourth) has consistently held, subsequent to the *Holland* decision, that to sustain conviction in circumstantial evidence cases:

> the inferences reasonably to be drawn from the evidence must not only be consistent with the guilt of the accused but inconsistent with every reasonable hypothesis of innocence.

United State v. Haggins, 545 F.2d 1009, 1012 (5th Cir. 1977). Also see *Strauss v. United States*, 311 F.2d 926, 931-32 (5th Cir. 1963); *United States v. Rojas*, 537 F.2d 216, 220 (5th Cir. 1976); *United States v. Casey*, 540 F.2d 811, 814 (5th Cir.

1976); *United States v. Marshall*, 557 F.2d 527, 530 (5th Cir. 1977). Accordingly, it is submitted that there is a real and embarrassing conflict of opinion and authority between the circuits on this point. The points and principles involved are important to the public interest. This Court should, accordingly, review this case in order to preserve and assure uniformity of federal law.

CONCLUSION

The judgment below is in conflict with applicable case law of this Court, and is in conflict with decisions of other circuits on the same principle of law. The principle of law involved lies at the heart of criminal due process, and should thus be reviewed by this Court. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OFAPPEALS FOR THE FOURTH CIRCUIT

No. 78-5025

United States of America,

Appellee,

v.

Cotton Ethier Davis,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Judge James R. Miller, Jr.

(Argued February 4, 1979 Decided May 24, 1979)

Before BRYAN, Senior Circuit Judge, BUTZNER and RUSSELL, Circuit Judges.

Luther C. West for Appellant; Donald Feige, Assistant United States Attorny (Russell T. Baker, Jr., United States Attorney, Glenn L. Cook, Assistant United States Attorney on brief) for Appellee.

PER CURIAM:

Defendant Cotton E. Davis was convicted of unlawfully importing 945 pounds of hashish, 21 pounds of hashish oil, and 4 pounds of marijuana seeds in violation of 21 U.S.C. §§952(a) and 960 (a) (1) (1970). He was also found guilty of possession, with intent to distribute, of similar controlled substances, contrary to 21 U.S.C. §§841(a) (1) and 841(b) (1970). On appeal, defendant contends that it was prejudicial error for the Court to have instructed that "circumstantial evidence is sufficient to support a verdict of guilty. . . even though it does not exclude every reasonable hypothesis consistent with innocence." We overrule the assignment of error and affirm.

Specifically, defendant urges that the evidence against him was entirely circumstantial and that the trial court by this charge invited the jury to disregard his explanation of his acts. He, however, fails to quote in its entirety the charge, which on the point was in these words:

> The jury is instructed that if it believes that there are two alternative inferences that can be drawn equally as well as from all the facts in the case, then it is your duty to adopt the inference most favorable to the defendant, since you cannot find the defendant guilty unless you believe that each essential element in the crime charged has been proved beyond a reasonable doubt. . . . Circumstantial evidence is sufficient to support a verdict of guilty, however, even though it does not exclude every reasonable hypothesis consistent with innocence.

Reading the instruction as a whole we appraise the error, in any, as harmless. In *Holland v. United States*, 348 U.S. 121, 140 (1954) the Court examined the contention made here against the instruction but approved the conviction therein, adding that the submission in its entirety "correctly conveyed the concept of reasonable doubt to the jury." *Id* at 140.

Again, as the First Circuit phrased it in *United States v. Francomano*, 554 F.2d 483, 486 (1st Cir. 1977), the "proper test to be applied when the evidence is largely circumstantial is 'whether the total evidence, including reasonable inferences, when put together is sufficient to warrant a jury to conclude that defendant is guilty beyond a reasonable doubt.'"

We have no question that the instruction before us was fair and reasonable, in that it placed the burden of proof squarely on the Government with regard to each essential element of the indicted crimes. For the future, we would suggest, nevertheless, that courts should refrain from instructing juries that the prosecution's evidence need not exclude every reasonable hypothesis consistent with innocence. This language is more likely to confuse than to instruct a jury. An adequate charge on reasonable doubt is sufficient. *Cf.* Holland v. United States, 348 U.S. at 139-40.

Affirmed.

APPENDIX B

EXCERPT FROM INSTRUCTION OF TRIAL COURT IN ISSUE

(T. 9)

* * * * *

. . . the burden or duty of calling any witnesses or producing any evidence, and no adverse inferences may be drawn from his failure to do so.

There are two types of evidence from which a Jury may properly find a defendant guilty of an offense. One is direct evidence such as the testimony of an eye witness. The other is circumstantial evidence, the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence but simply requires that, before convicting the defendant, the Jury be satisfied of his guilt, beyond a reasonable doubt, from all the evidence in the case, be it direct evidence only, circumstantial evidence only, or a combination of the two.

The Jury is instructed that if it believes that there are two alternative inferences that can be drawn equally as well from all the facts in the case, then it is your duty to adopt that inference most favorable to the defendant, since you cannot find the defendant guilty unless you believe that each essential element of the crime charged has been proven beyond a reasonable doubt.

Circumstantial evidence is sufficient to support a verdict of guilty, however, even though it does not exclude every reasonable hypothesis consistent with innocence.

You, as Jurors, are the sole judges of the (T. 10) credibility of the witnesses and of the weight their respective testimony deserves. You should carefully scrutinize the testimony given by each witness, the circumstance under which each witness has testified and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, his or her motive and state of mind and his demeanor and manner while on the witness stand. Consider also any relationship each witness may bear to either side of the case, the manner in which each witness may be affected, if at all, by the verdict, and the extent, if at all, each witness is either supported or contradicted by other evidence.

Now, the defendant has testified in this case, and his testimony should be considered by you in accordance with the same principles that apply to any other witness which I am now enumerating to you.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause the Jury to discredit such testimony. Two or more persons witnessing an incident may see or hear it differently, and innocent misrecollection, like failure of recollection, is not an uncommon experience. Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses should be considered by you, but in weighing their effect, you should. . .

* * * * *